# STATE OF MICHIGAN

# COURT OF APPEALS

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TOM CAMP and VIRGINIA CAMP,

Plaintiffs-Counterdefendants-Appellants,

v

MECOSTA COUNTY ROAD COMMISSION,

Defendant-Counterplaintiff-Third-Party Plaintiff-Appellee,

and

JEANNETTE WHITE, MALCOLM WHITE, EARL CAMPBELL, PAMELA CAMPBELL, KEN JANSEN, LUPE JANSEN, BELVA HEWITT, JOHN CHAPUT, HARRY WEAVER, ANNABELLE WEAVER, JIM BAHURA, NAJIB BAHURA, MARY BAHURA, and JAMES HARVEY,

Third-Party Defendants.

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UNPUBLISHED
July 12, 2005

No. 255154
Mecosta Circuit Court
LC No. 01-014440-CH

Before: Murphy, P.J., and Sawyer and Donofrio, JJ.

PER CURIAM.

Plaintiffs Tom and Virginia Camp appeal as of right an order granting summary disposition in favor of defendant Mecosta County Road Commission pursuant to MCR 2.116(C)(10). Because material factual issues abound, we reverse and remand for further proceedings.

This case involves a disputed portion of roadway, which defendant refers to as 100th Avenue located in Chippewa Township. The segment of this road at issue runs north from 21 Mile Road to the south shore of Pine Lake, and it is approximately located on the section line between sections 16 and 17. Plaintiffs filed a quiet-title action against defendant, asserting that the roadway was private property and not a "public" road because it had never been dedicated or platted as such and because the statutorily-created doctrine of highway by user, MCL 221.20, could not be established. Defendant denied plaintiffs' allegations that the road was not a public

road, contending that highway by user and other legal theories established that the road was indeed public. Defendant additionally filed a counterclaim solely on the basis of highway by user and subsequently brought into the action various other parties who owned interests in property along the disputed stretch of 100th Avenue, which interests might be impacted by the highway by user claim. Plaintiffs filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that, as to the northernmost 1000 feet of the disputed roadway, there was no evidence establishing that it was platted, dedicated, or accepted as a public road, or that it was a public road by virtue of the highway by user doctrine. Defendant also filed a motion for summary disposition pursuant to MCR 2.116(C)(10), arguing that there was no genuine issue of material fact that the disputed section of road was "public" via highway by user.

At the hearing on the cross motions for summary disposition, the court, ruling from the bench, granted defendant's motion for summary disposition on the issue of highway by user, which effectively resulted in the dismissal of plaintiffs' entire action. The trial court also found that the road was four rods in width. Although the issues concerning dedication, acceptance, and platting were bandied about at the hearing, the trial court's ruling focused solely on highway by user.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. *Id.* When the evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). A genuine issue of material fact exists when the record leaves open an issue on which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

As mentioned above, the doctrine of highway by user is governed by MCL 221.20, which provides:

> All highways regularly established in pursuance of existing laws, all roads that shall have been used as such for 10 years or more, whether any record or other proof exists that they were ever established as highways or not, and all roads which have been or which may hereafter be laid out and not recorded, and which shall have been used 8 years or more, shall be deemed public highways, subject to be altered or discontinued according to the provisions of this act. All highways that are or that may become such by time and use, shall be 4 rods in width, and where they are situated on section or quarter section lines, such lines shall be the center of such roads, and the land belonging to such roads shall be 2 rods in width on each side of such lines.

A roadway fitting within the confines of MCL 221.20 is treated "as impliedly dedicated to the state for public use." *City of Kentwood v Sommerdyke Estate*, 458 Mich 642, 652; 581 NW2d 670 (1998). Highway by user is a term used to describe how the public may acquire title to a highway by a sort of prescription where no formal dedication was ever made. *Cimock v Conklin*, 233 Mich App 79, 86; 592 NW2d 401 (1998). "Establishing a public highway pursuant

to the highway by user statute requires (1) a defined line, (2) that the road was used and worked on by public authorities, (3) public travel and use for ten consecutive years without interruption, and (4) open, notorious, and exclusive public use." *Kalkaska Co Bd of Co Rd Comm'rs v Nolan*, 249 Mich App 399, 401-402; 643 NW2d 276 (2002). The burden of showing a highway by user is on the governmental entity claiming public ownership under the doctrine. *Cimock, supra* at 87 n 2. The trial court found, as a matter of law and on the basis of documentary evidence, that the disputed portion of 100th Avenue constituted a defined line, that the road was sufficiently used and worked on by public authorities, that there was public travel and use for ten consecutive years without interruption, and that there existed open, notorious, and exclusive public use of the roadway.

Concerning the second element, the trial court found that defendant performed enough work on the road to satisfy this requirement, although the court acknowledged that it was a very close call and that, as a matter of public policy, it was "legally opting for the preference to keep the road in the public domain and [to] keep the road accessible to Pine Lake." On appeal, plaintiffs challenge the court's findings with regard to the elements of highway by user, along with challenging the court's finding that the public road was four rods in width.

Maintenance work must be performed on the disputed roadway for ten or more years. *Cimock, supra* at 90. In *Cimock*, this Court concluded that the trial court did not clearly err when it found that the road commission "had performed maintenance work on the disputed roadway for more than ten years." *Id*. at 90. The relevant work in *Cimock* consisted of power grading and snowplowing around 1989, snowplowing and road maintenance between 1976 and 1980, and grading from 1973 to 1976. *Id.* at 88-89. In *Nolan*, *supra* at 403, this Court similarly held that the trial court "did not clearly err in finding that the county had maintained the road for well over ten years." The relevant work in *Nolan* occurred "'from time to time and place to place, as a need was apparent and resources would permit, from 1947 to the present time.'" *Id*. at 402 (quoting the lower court).

In *Pullybank v Mason Co Rd Comm*, 350 Mich 223, 229; 86 NW2d 309 (1957), our Supreme Court held that consecutive years of work by public authorities is not necessary. The Court stated:

> The plaintiffs object that the examples of repair and upkeep testified to are sporadic, in effect that the instances given do not cover, consecutively, year after year. Such testimony is not necessary. Work on country roads reflects not only the state of the municipal treasury, but is adjusted also to the needs of local traffic and local inhabitants. It is clear that the work done, whatever it was, kept the road in a reasonably passable condition. [*Id.*]

The relevant work in *Pullybank* consisted of work done at various times from 1919-1930, including brushing, scraping, and filling in holes, along with snowplowing and grading performed in the 1940s and 1950s. *Id.* at 228-229. The Supreme Court found this work sufficient to indicate acceptance of an implied dedication. *Id.* at 229-231.

In the present case, both parties relied on a record of road maintenance kept by defendant. These records consist of time sheets filled out by defendant's employees. On the back of each time sheet is a map on which the employee indicates the roads worked on during that shift by

drawing a line over them. Defendant began this method of recordkeeping sometime in the 1980s. The records indicate that in 1986 an employee of defendant did eight hours of drainage and backslope work. The map indicates this work was performed on a creek to the east of Pine Lake in between sections 9 and 16. The creek crosses 100th Avenue north of Pine Lake, but does not appear to affect the disputed portion of 100th Avenue south of Pine Lake. The map does not indicate that work was actually performed on or adjacent to 100th Avenue. In 1991, another employee of defendant performed ten hours of "winter maintenance." He did not indicate which specific roads were worked on, but rather he circled a large swath of area that encompassed several dozen roads including the disputed portion of 100th Avenue. Finally, in March 1993, two of defendant's employees indicated on their time cards that they performed winter maintenance along many miles of roadway including the disputed portion of 100th Avenue.

Ed Birch, defendant's manager from 1968 to 1995, testified as follows:

*Q*. So the Road Commission didn't do any work on 100th avenue north of 21 Mile Road. It was Rothlisberger that--

*A*. During my time, yes. We never did any physical work on it because it was never required by the Township, et cetra [sic], to do any work on it.

*Q*. So Rothlisberger did whatever he did on that road in the eighties sometime?

*A*. That's right. And I think we had to run a motor grader up there or something like that. I mean -- he had the capabilities of -- with dozers and earth pans and so forth, but he didn't have a motor grader, so as I -- you know, I just -- I'm sure that -- my mind tells me that we probably had to run a motor grader up there or something to make it halfway passable. So that it would be passable at least part of the year. Because he wouldn't have that.

*Q*. Do you have an independent recollection of actually having a grader up there?

*A*. No, I just - - I'm just sitting here today, and I said I must have sent a motor grader up there, but I can't point to a record and say on this specific day I sent a motor grader up there. But we worked with Rothlisberger, we had to work with him - - we worked with Tim because he had - - we worked with him on a number of projects. And that's how I had to work with him.

*Q*. But he had equipment up there?

*A*. Yeah, he had equipment up there. Yeah he sure did. Because it had to be done because the Township didn't want to spend any money at that time on the road. And the Road Commission didn't want to spend any money because we didn't have money to spend.

Other evidence relating to the period of time prior to 1996 indicates that the road may or may not have been passable for a period of years. Weaver, a third-party defendant, testified that parts of the road were not passable in 1991. Weaver made repeated maintenance requests to defendant in 1992, 1993, 1994, and 1995, which were all denied. Weaver performed

maintenance on the road, purchasing gravel to fill a hole in 1992, grading it with his own tractor approximately four times a year between 1992 and 1996, and plowing snow in the winter. In 1995, the Chippewa Township Clerk wrote a letter to defendant indicating that the disputed portion of 100th Avenue was impassable since the excavation project started by Rothlisberger in the 1980s. An affidavit provided by plaintiffs avers that the disputed portion of road was essentially impassible after the mid-1980s and only occasionally passable after 1996. Defendant provided the affidavits of several witnesses who stated that they used the road several times a year for over ten years throughout the 1990s to access the lake for recreational purposes. We note that these affidavits make no reference to the quality of the road, nor give any indication whether it was difficult or easy to traverse the road with their vehicle.

The record indicates that in the summer of 1996, defendant graded the disputed portion of 100th Avenue north from 21 Mile Road to the shore of Pine Lake. In March 2001, defendant applied gravel to the disputed portion of 100th Avenue in several locations. The disputed portion of road was graded in April of 2001.

Taken in a light most favorable to plaintiffs, the evidence does not provide proof, sufficient to warrant summary disposition in defendant's favor, that the disputed portion of roadway has been maintained at the necessary level for the requisite ten years as a matter of law. While significant work was performed between 1996 and 2001, this alone does not satisfy the maintenance element of establishing a highway by user.[1] Birch's testimony regarding the possibility of a grader being used in the 1980s is somewhat vague, speculative, and unpersuasive, and it must be weighed by the trier of fact. Nothing in the employee time records conclusively establishes that any work was performed prior to 1993. In 1993, there is a record of the two instances of snow maintenance. The other time cards are too vague to draw any definitive conclusions in the context of considering a motion for summary disposition. Furthermore, there is conflicting evidence regarding whether the road was passable during the late 1980s and early to mid 1990s, thus creating a fact question with respect to whether defendant "kept the road in a reasonably passable condition." *Pulleybank, supra* at 229. In sum, reasonable minds could differ regarding whether the disputed portion of 100th Avenue was maintained by the road commission for the requisite period of time in such a manner as to satisfy the road maintenance element of highway by user.

Defendant argues that this Court should consider maintenance efforts directed at 100th Avenue at various locations throughout Mecosta County, including those sections within the townships of Chippewa, Martiny, Morton, and Hilton.

Defendant correctly asserts that Michigan courts have consistently held that not every part of a highway must be worked upon in order to establish a public highway under the highway by user doctrine or common law dedication. *DeFlyer v Oceana Co Rd Comm'rs*, 374 Mich 397, 401-402; 132 NW2d 92 (1965); *Pullybank, supra* at 227; *Neal v Gilmore*, 141 Mich 519, 527,

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[1] To avoid any potential dispute or misinterpretation on remand, we are not concluding that the work performed from 1996 to 2001 is irrelevant; it may be considered in relation to other evidence presented at trial in determining whether a highway by user was established.

104 NW 609 (1905). However, while maintenance does not need to be performed on every inch of a disputed roadway, the maintenance must be performed on (1) the section of roadway which is being claimed to have been impliedly dedicated under the highway by user doctrine or (2) an immediately adjacent portion of the highway for use in connection with the disputed portion of highway. See *DeFlyer*, supra at 401; *Neal, supra* at 527; *Nolan, supra* at 403.

In *Neal, supra* at 526-527, our Supreme Court held:

> The evidence is undisputed that no work was done upon the 80-rod strip [crossing the plaintiff's land] between the fences, which was obstructed by the cross-fences torn down by defendants; but it is also substantially undisputed that this 80 rods was a reasonably good highway, which did not need to be worked. It is not essential that every part of a highway should be worked in order to evidence the intention of the public authorities to accept and maintain the entire highway. The jury might properly find, under the evidence in this case, that the portions worked were so worked for use in connection with the 80 rods not worked.

Similarly, in *Nolan, supra* at 403, this Court concluded that "the trial court did not err in considering maintenance efforts undertaken by plaintiff beyond the segment of Squaw Lake Road crossing defendants' property and did not clearly err in finding that the county had maintained the road for well over ten years."

The only evidence offered to the trial court on this point is a document which indicates that 100th Avenue between Chippewa Drive and 21 Mile Road was graded in 1996 and paved in 1998. This appears to be a section of roadway directly south of the disputed portion of road. Assuming *arguendo* that this work is relevant, it fails to establish as a matter of law that the road maintenance requirement of highway by user was satisfied, even taking into consideration the other conflicting and speculative evidence regarding direct maintenance on the disputed section of roadway. Moreover, there is no evidence that this section of road was maintained for use in connection with the disputed portion of 100th Avenue. Finally, defendant argues that this Court should consider maintenance efforts directed at 100th Avenue at numerous locations throughout various townships. First, we note that defendant does not offer evidence to support the occurrence of these alleged maintenance efforts. Moreover, even were such evidence proffered, the patchwork nature of 100th Avenue throughout the county militates against a finding that other portions of the road, often not connected, were maintained for the benefit of the disputed portion of road. Defendant is, however, permitted to offer relevant, admissible evidence of road maintenance on other portions of 100th Avenue should this case proceed to trial.

Regarding the other elements of highway by user, we find no error with the court's conclusion that there existed a defined line of travel as established by the documentary evidence. See *Nolan, supra* at 402; compare *Watson v Bd of Co Rd Comm'rs of Montmorency Co*, 52 Mich App 258; 217 NW2d 129 (1974). The "defined line" element is thus satisfied for purposes of remand. With respect to the element pertaining to open, notorious, and exclusive public use, plaintiffs have not directly appealed that portion of the court's ruling, but it is necessarily tied, in part, to plaintiffs' argument that the trial court erred in finding public use of the roadway for the requisite ten-year period. There was evidence that a meager number of individuals, outside of residents, used the roadway. There was also evidence suggesting that the roadway was

impassable for a period of time, calling into question the evidence submitted by defendant and creating an issue of fact as to whether there was public travel and use for ten consecutive years without interruption. We also note the cursory nature of the affidavits submitted by defendant. Additionally, while the limited number of outside individuals who supposedly utilized the road does not defeat defendant's position, considering that public use is sufficient if the road is traveled as much as the circumstances of the surrounding population, businesses, and environment requires, *Nolan, supra* at 403, reasonable minds could differ whether the amount of use proffered by defendant, should such use be established at trial, was sufficient to satisfy the public use elements of highway by user.

Finally, if on remand defendant succeeds pursuant to the doctrine of highway by user, the issue of the road width will likely rise again. We simply direct the court to heed the following quote from *Sommerdyke, supra* at 659-660:

> The public road is only as wide as actual use where the plaintiff presents evidence that the presumption of dedication has been rebutted within the statutory period of repose. If the presumption is not rebutted within the statutory period, the road is deemed dedicated to the full extent of the four-rod width.

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Pat M. Donofrio